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SUPREME COURT, U.S.

No. 97-1955

In The

Supreme Court of the United States

October Term, 1997

MELVIN GRIGLEY,

Petitioner,

vs.

CITY OF ATLANTA, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The Petitioner, Melvin Grigley, is a current employee of the City of Atlanta, working as a Sergeant in the Police Department. The events leading to this action began on May 31, 1993. On that date, Grigley was involved in an altercation at his home with another City of Atlanta police officer, Phyllis Hayes-Dix. The fight was the continuation of a dispute between the two officers over the paternity of Hayes-Dix's young son. Police officers for the City of East Point, Georgia, arrived at the scene and issued citations for disorderly conduct to both Grigley and Hayes-Dix.

In the wake of the incident, the Police Department's Office of Professional Standards [hereinafter: OPS] investigated the conduct of both Grigley and Hayes-Dix. At deposition, Grigley testified that, during the OPS investigation, Sergeant Cox suggested that he drop the charges against Hayes-Dix and let the Department handle the matter administratively.

> A. It was suggested that I let the matter be handled administratively.
>
> Q. Right. Who suggested that to you?
>
> A. That was suggested by Sergeant Cox at the time.
>
> Q. When did she make that suggestion?
>
> A. During the course of the might I say questioning. During the course of my questioning.

Grigley dep. at 95, 1.19 to p. 96, 1.1.

> Q. Did any officer of a higher rank, a rank higher than that of sergeant, ever suggest to you that this matter would better be handled internally by the police department than externally by the City of East Point?
>
> A. Not that I can recall at present.

Grigley dep. at 96, l.9 to l.14.

The deposition testimony is at odds with Grigley's assertion that "he was repeatedly encouraged to drop the charges against Hayes-Dix." Pet. at 3.[1]

At a hearing in the Municipal Court for the City of East Point, Grigley was found not guilty of disorderly conduct and Hayes-Dix was found guilty of disorderly conduct and fined. The City did not discipline Grigley for his conduct relating to the May 31 incident.

On November 20, 1993, and again on March 1, 1994, Grigley was involved in off-duty incidents with Karen Jackson, the mother of his child. Grigley was disciplined for his conduct, subjected to a drug test, and referred to the City's Psychological Services Unit for evaluation and counseling.

On September 19, 1995, Grigley filed this action against the City and various City employees. Among other things, Grigley claimed that the City had retaliated against him because he did not drop charges against Hayes-Dix. Grigley claimed that the Defendants' actions violated his First Amendment rights of freedom of speech and to petition for redress of grievances.

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1. This misstatement of the facts bears on the issue before the Court should certiorari be granted.

At the conclusion of the discovery period, Defendants filed a motion for summary judgment as to all of Grigley's claims. United States District Judge Clarence Cooper granted Defendants' motion and entered judgment in favor of the Defendants. App. 11a. The Eleventh Circuit affirmed. *Grigley v. City of Atlanta*, 136 F.3d 752 (11th Cir. 1998). App. 1a.

REASONS FOR DENYING THE WRIT

Grigley claims that certiorari is warranted because the decision of the Eleventh Circuit conflicts with the decision of the Third Circuit on the same subject, *San Filippo v. Bongiovanni*, 30 F.3d 424 (3rd Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995). Pet. at 2. This Court should deny Grigley's petition for certiorari because the facts in this case do not fall within the holding of *San Filippo*, and, therefore, do not provide this Court with an opportunity to resolve the conflict between the Circuits.

The holding at issue in this case is as follows:

> [A] public employee's claim of retaliation in violation of the First Amendment right to petition is subject to the public concern requirement. Accordingly, where a public employee's petition does not address a matter of public concern, the judicial inquiry should end at the first of the four steps outlined in *Bryson* and no specific balancing of interests is necessary.

136 F.3d at 755-56, referencing *Bryson v. City of Waycross*, 888 F.2d 1562, 1565-66 (11th Cir. 1989).

The decision below is consistent with the decisions of the Second, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits

on the same subject. *Rendish v. City of Tacoma*, 123 F.3d 1216 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 2368 (1998); *Valot v. Southeast Local School Dist. Bd. of Educ.*, 107 F.3d 1220, 1226 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 164 (1997); *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1059 (2d Cir. 1993), *cert. denied*, 510 U.S. 865 (1993); *Hoffman v. Mayor, Councilmen and Citizens of Liberty*, 905 F.2d 229, 233 (8th Cir. 1990); *Schalk v. Gallemore*, 906 F.2d 491, 498 (10th Cir. 1990); *Belk v. Town of Minocqua*, 858 F.2d 1258, 1261-62 (7th Cir. 1988); *Day v. South Park Indep. School Dist.*, 768 F.2d 696, 701 (5th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986). In these cases, the Courts of Appeals imposed the same public concern requirement on a public employee's petition claim that this Court has imposed on a public employee's free speech claim.

> When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.

Connick v. Meyers, 461 U.S. 138, 146, 103 S. Ct. 1684, 1690, 75 L. Ed. 2d 708 (1983).

Grigley argues that the Eleventh Circuit erred in applying the public concern requirement to his petition claim. Pet. at 3-4. Grigley relies on the Third Circuit's decision in the *San Filippo* case, which he contends is "more persuasive" than the aforementioned decisions. Pet. at 8. The problem with Grigley's reliance on *San Filippo* is that the holding in *San Filippo* does not apply to the facts in this case.

San Filippo stands for the proposition that a public employee is protected under the petition clause of the First

Amendment when he files a "non-sham" grievance or a lawsuit against the public employer, even if the grievance or lawsuit does not address a matter of public concern. 30 F.3d at 443. San Filippo was a tenured chemistry professor employed by Rutgers University. 30 F.3d at 426. San Filippo contended that he was discharged from employment because he had filed various internal grievances and two lawsuits against the University. 30 F.3d at 434-35. The grievances had been filed pursuant to the provisions of a collective bargaining agreement between the University and the Rutgers Council of the American Association of University Professors. 30 F.3d at 426, n.1 and 434-35. The Third Circuit reasoned that the government should not establish a mechanism for the redress of grievances and then penalize the employee who utilizes the mechanism.

> [N]either the United States nor the several states are required to recognize as a "petition" whatever particular communication is so characterized by one who chooses to protest governmental acts or omissions. But when government — federal or state — formally adopts a mechanism for redress of those grievances for which the government is allegedly accountable, it would seem to undermine the Constitution's vital purposes to hold that one who in good faith files an arguably meritorious "petition" invoking that mechanism may be disciplined for such invocation by the very government that in compliance with the petition clause has given the particular mechanism its constitutional imprimatur.

30 F.2d at 442.

The Third Circuit concluded that "[t]he mere act of filing a non-sham petition is not a constitutionally permissible ground for discharge of a public employee." 30 F.3d at 443.

The Third Circuit's subsequent decision in the case of *Anderson v. Davila*, 125 F.3d 148, 162 (3rd Cir. 1997), focuses the holding in *San Filippo*. Plaintiff Anderson had filed a charge of discrimination against his employer with the Equal Employment Opportunity Commission (EEOC) and his attorney had notified the employer of Anderson's intention to file suit. 125 F.3d at 161. The employer instituted surveillance against Anderson, and Anderson filed suit against the employer for violation of his First Amendment right to petition. The Third Circuit stated that the public concern requirement "does not apply in cases where the speech itself constitutes the plaintiff's lawsuit. In *San Filippo* we held that a plaintiff need only show that his lawsuit was not frivolous in order to make out a prima facie retaliation claim." 125 F.3d at 161 (internal citations omitted). The court explained that,

> By lodging a complaint with the EEOC, itself a precursor to his employment discrimination suit, Anderson was petitioning the government to "fix" a problem within the Virgin Islands Police Department. Instead of engaging in such repair, the Government compounded Anderson's grievances by initiating its surveillance operation. Were we to ignore the Government's retaliation, we would render Mr. Anderson's First Amendment petition right effectively useless. Officials could simply engage in harassment any time an individual filed, or announced his intention to file, a lawsuit against them. This result is hardly consistent with the fundamental principles of orderly protest, which our Constitution sought to preserve by protecting our right to petition the government for redress.

125 F.3d at 162-63.

In this case, Grigley does not claim that he was retaliated against for petitioning the City of Atlanta for redress of his grievances against it. Instead, Plaintiff's right to petition claim is founded upon his pursuit of "criminal"[2] charges against his co-worker in the Municipal Court of the City of East Point. Grigley's activities in the Municipal Court of East Point simply do not fall within the purview of *San Filippo*. The Eleventh Circuit noted the difference in the decision below:

> Although we do not find the reasoning of [*San Filippo v.*] *Bongiovanni* to be persuasive, it is not clear that *Bongiovanni* would support Grigley under these facts. *Bongiovanni* repudiates the public concern requirement where the government employer "formally adopts a mechanism for redress of those grievances for which government is allegedly accountable," reasoning that "when one files a 'petition' one is addressing government and asking government to fix what, allegedly, government has broken or has failed in its duty to repair." 30 F.3d at 442. Grigley's claim can be distinguished for two reasons: (1) Grigley did not file any sort of claim or grievance at all, but merely testified against a female co-worker and refused to "drop" charges against that co-worker; and (2) Grigley did not seek to redress any adverse action taken by the government employer against him. The holding in *Bongiovanni* focuses on the relationship

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2. Grigley categorizes the proceedings in the Municipal Court of the City of East Point, Georgia, as "criminal" proceedings. Violations of municipal ordinances are not "crimes" within the meaning of Georgia law. O.C.G.A. § 16-1-4. Municipal ordinance violations are considered to be criminal offenses for constitutional purposes, such as the prohibition against double jeopardy. *State v. Burroughs*, 244 Ga. 288, 260 S.E. 2d 5, 7 (1979), *vacated on other grounds*, 448 U.S. 903 (1980).

> between the government employer and the employee and seeks to vindicate the right of the employee to pursue the employer's formal grievance process. The facts in the present case do not fall within that framework.

136 F.3d at 754, n.3.

The Eleventh Circuit correctly observed that the facts in this case do not fall within the framework of *San Filippo*. The Third Circuit's decision protects public employees who are protesting governmental acts or omissions through mechanisms created to redress those grievances. *San Filippo*, 30 F.3d at 442. Grigley was not attempting to fix a problem created by the City of Atlanta, but was pursuing a personal grievance against his co-worker in an unrelated forum. The facts presented by Grigley do not provide an opportunity the resolve the conflict between the Eleventh Circuit's decision in this case and the Third Circuit's decision in *San Filippo*.

CONCLUSION

For the reasons set out above, the petition for certiorari should be denied.

Respectfully submitted,

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